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No. 99-596

In the
Supreme Court of the United States

GEORGE MASON UNIVERSITY,
Petitioner,

v.

UNITED STATES OF AMERICA and
ANNETTE CRECO LITMAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Attorney for Amicus Curiae Pacific Legal Foundation

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QUESTION PRESENTED

May Congress require a state to waive its sovereign immunity as a condition of receiving federal funds?

MOTION AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation respectfully submits this motion for leave to file a brief amicus curiae in support of the petition for writ of certiorari.[1] Written consent was granted by counsel for the Petitioner and Respondent United States and lodged with the Clerk of this Court. Counsel for Respondent Annette Litman has withheld consent.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF litigates nationwide with the support of thousands of citizens from coast to coast.

In its fight to protect basic liberties, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. This is a case of great public importance because this Court is asked to reassess its interpretation of the spending power. Under current Supreme Court precedent, Congress may attach virtually any condition on a grant of federal funds to the states. This has caused an imbalance in our federal form of government that makes a nullity of the Tenth Amendment and a mockery of the Framer's promise of a limited central government. Any decision this Court makes, even a decision not to review, will either foster or undermine the Constitution's federalist design. Therefore, this

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[1] In accordance with Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

case has far reaching implications and warrants input from a broad spectrum of public interests.

PLF has litigated many cases dealing with constitutional interpretation and is a frequent amicus participant in this Court. PLF's public policy perspective will provide a necessary viewpoint on the issues presented in this case. Therefore, PLF respectfully requests that this Court grant PLF's motion to file the attached amicus curiae brief in this case.

DATED: December, 1999.

Respectfully submitted,

M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Attorney for Amicus Curiae Pacific Legal Foundation

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STATEMENT OF THE CASE

This case involves a sexual harassment claim. Annette Litman alleged she was harassed by Dr. Eugene Norris for whom she worked as a research assistant while a student at George Mason University. A faculty panel found that Dr. Norris had not violated the University's sexual harassment policy and imposed no disciplinary sanctions, although Dr. Norris was directed to have no further contact with Ms. Litman.

About this same time, two faculty members filed complaints against Ms. Litman for sexual harassment. Ms. Litman was found to have violated University policy. She was barred from taking additional classes and forbidden to enter campus. Ms. Litman sued these faculty members and the University in federal court. Her claims against the University included: (1) that the University violated Title IX of the Education Amendments of 1972 because Dr. Norris harassed her, and (2) the University violated Title IX because University employees filed unwarranted charges against her.

The University moved to dismiss on sovereign immunity grounds arguing the following statutory provision--a condition on the receipt of federal funds--is an unconstitutional abrogation of states' rights.

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statutes prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1) (citations omitted).

The United States intervened to defend the constitutionality of this provision. The Fourth Circuit ruled in favor of the United States holding that the conditioning of federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is permissible. The University now petitions the United States Supreme Court to restrict Congress' ability to condition federal funding on waivers of sovereign immunity.

SUMMARY OF THE ARGUMENT

The Framers of the Constitution envisioned a national government of limited powers. This limitation on federal authority was designed to keep a proper balance between local and national interests and to protect the sovereign states from undue interference by a central government. As a safeguard to tyranny from either government, this balance was made express in the Tenth Amendment. However, the ability of Congress to place virtually any condition on the receipt of federal funds nullifies the Framer's promise of a limited central government and destroys the intent of the Tenth Amendment.

This Court has all but abdicated to Congress the role of defining federal power under the Spending Clause rendering the concept of enumerated powers illusory. In addition, two other factors contribute to Congress' ability to use the spending power to further virtually any federal objective and intrude into state and local interests. First, Congress can tax income at will and be assured of an almost limitless supply of money. And, second, restrictive standing rules essentially insulate federal spending actions from court review.

Because of increasing reliance by states on federal funds and the federal government's dependence on taxes from the states' citizens, the states are not free to reject conditional federal funds. Federal grants amount to billions of dollars a year and comprise a significant portion of state and local budgets.

Conditions on federal funds are pervasive and may even alter state structures. Indeed, every grant of federal funds comes with at least 59 regulatory conditions that bear little resemblance to the funds' purposes. Such conditions are often coercive and allow Congress to effectively "regulate" the states indirectly where Congress could not regulate directly.

This Court has not provided any meaningful standards for determining the scope of the spending power. In fact, after *South Dakota v. Dole*, wherein this Court upheld broad conditions on the receipt of federal funds, legal scholars agree that the the federal government can no longer be considered a government of limited, enumerated powers. Additionally, this Court's spending power jurisprudence is inconsistent allowing the impression that a condition on federal funds will stand or fall on the personal inclinations of the justices.

Finally, although this Court has resuscitated the principles of federalism in its recent decisions such as *New York v. United States* and *Printz v. United States*, the Court has left a gaping hole in the federalist structure by not addressing the scope of the spending power. Congress can effectively override the decisions of this Court through conditions on federal funds. Three days after this Court invalidated the Gun Free School Zones Act in *United States v. Lopez* for exceeding Congress' power under the Commerce Clause, President Clinton declared Congress could require the states to enforce the law as a condition on federal funds.

If the federalist design of the Constitution is to mean anything, this Court must set some workable limits on Congress' power to "regulate" the states by coercive conditions on federal funds. Therefore, this Court should grant the writ of certiorari.

ARGUMENT

I

THE VIRTUALLY UNLIMITED ABILITY OF CONGRESS TO CONDITION THE RECEIPT OF FEDERAL FUNDS UNDERMINES THE FEDERALIST DESIGN OF THE CONSTITUTION

This is a case of national importance; it raises fundamental questions about the balance of power between the federal and state governments. Because this Court has not established the contours of the spending power--although it has hinted some limits apply--Congress' ability to condition the receipt of federal funds is virtually unfettered. Such conditions may bear little semblance to the purpose of the funds and expose the states to coercive sanctions for failure to comply. By this means, Congress effectively "regulates" the states in ways the Framers could never have envisioned or intended and which far exceed the limits of its enumerated powers. The result is a weakened state soveriegn and an imbalance in the federal structure.

The constitutional debates were animated by the question of where to draw the line between a national government and state autonomy. The Federalist Papers, which sprang from those debates, were an attempt to elucidate where this line should be drawn. The Framers envisioned a limited government bounded by the Constitution's enumerated powers. This limitation on federal authority was devised by the Framers to keep a proper balance between local and national interests and to protect the united, but sovereign, states from heavy-handed interference by a central government. However, the states wanted further assurance of their independant sovereignty. Therefore, eight of the nine states required for ratification insisted on an express statement of states' rights before they would ratify the Constitution. *See* Douglas W. Kmiec, *Commerce, The Tenth Amendment, and Guns in Schools, Update on Law-Related Education*, 4 (1995). That statement

now appears as the Tenth Amendment to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

These words are not precatory. Rather, they define substantively the pragmatic balanced federal structure that would protect state sovereignty from federal encroachment. The Tenth Amendment memorializes the principles of the federalist design; the bed-rock foundation on which this Nation would be built. As James Madison declared: "The powers delegated by the proposed Constitution to the Federal Government, are few and defined" and "[t]hose which are to remain in the State Governments are numerous and indefinite." The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

Clearly, the Constitution calls for a balance between state and federal powers. But, a discussion of the federalist design necessitates a consideration of the reasons behind this directive. Ryan Squire suggests some important reasons for our federalist form of government. *See* Ryan C. Squire, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 Pepp. L. Rev. 869 (1998). Squire argues that a proper balance between state and federal governments protects individual liberties and guards against the blurring of political accountability.

Squire cites Alexander Hamilton for the view that the federalist design protects against "the attempts of (either) government to establish a tyranny." *Id.* at 877.

> Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and

> these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.

The Federalist No. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

James Madison held a similar view. For him a separation of powers was a "double security" to protect the liberties of the people. Squire at 878. Justice O'Connor endorsed this view in *Gregory v. Ashcroft* when she stated: "If this 'double security' is to be effective, there must be a proper balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991). Justice O'Connor concluded: "In the tension between federal and state power lies the promise of liberty." *Id.*

Squire believes the premise underlying the principles of federalism is "one of political accountability" and awareness. Squire at 879. According to Squire, to allocate their favor, the citizens must be able to determine which of the two governments is accountable for a given action. *Id.* He warns that if the scales of power between the national and state powers is tipped too far in one direction, the spheres of state and federal government would be blurred making political responsibility illusory. *Id.* "Citizens would be uncertain whom to hold responsible for disfavored actions." *Id.* For example, if the federal government tips the scales in its own direction by coercing state and local officials to regulate according to federal dictates, so that these officials cannot regulate according to local views and interests, the federal government may insulate itself from public disapproval by leaving the state and local officials to take the brunt of the actions. *Id.* at 879-80.

> Thus, a proper balance between federal and state authority helps to ensure that citizens are able to hold accountable those state or federal officials responsible for disfavored actions and implicitly ensures not only that the federal and state officials will be responsive to the needs of their respective electorates, but that the officials will indeed have the ability to be responsive to their electorates. Indeed, a properly balanced system of federalism ensures liberty by maintaining local self-governenace. In our republican democracy, in which citizens choose their representatives, few things are as important as political accountability.

Id. at 880-81.

As important as federalism is for the protection of individual liberties, the designated federal structure is at serious risk today. The core principles of federalism are undermined by the constant erosion of ever-expanding federal power under the Spending Clause. The ability of Congress to place almost any condition on the receipt of federal funds nullifies the Framer's promise of a limited central government and destroys the intent of the Tenth Amendment. Thus, Justice Scalia argues the issue of the spending power's encroachment on the state and federal balance is one of the most serious issues now facing federalism. Squire at 933.

Indeed, the issue is serious and should be addressed by this Court.

II

WITHOUT MEANINGFUL LIMITS ON FEDERAL SPENDING THE CONCEPT OF ENUMERATED POWERS IS ILLUSORY

Squire forcefully argues that expansion of the spending power in the twentieth century has made illusory the protections

of state sovereignty and the attendant safeguards against tyranny. Squire at 870. He maintains that this Court made a wrong turn in *United States v. Butler*, 297 U.S 1 (1936), when it interpreted the spending power broadly, in the mold of Alexander Hamilton, as restricted only by the General Welfare Clause, rather than more narrowly, as James Madison envisioned, as limited by the Constitution's enumerated powers. Squire at 870-71.

Madison believed that permitting Congress to spend for the general welfare effectively empowered Congress to legislate generally; that is, in purely state and local matters. *See* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 Va. L. Rev. 689, 729 n.159 (1994). In support of this belief, Madison observed that virtually every act of Congress involves money and bears some relation to the general welfare. Squire at 909. Madison concluded, therefore, that "a government with the power to spend for any purpose coming within the notion of general welfare 'is a government without the limitations formed by a particular enumeration of powers.'" Powell at 729 n.159.

Squire argues that in *Steward Machine Company v. Davis*, 301 U.S. 548 (1937), *Helvering v. Davis*, 301 U.S. 619 (1937), and *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court deferred to Congress to define the general welfare thereby granting Congress almost unlimited spending power. Squire at 871. Further, in *Berman v. Parker*, 348 U.S. 26 (1954), this Court effectively held that when Congress spends it is presumed to spend in furtherance of the general welfare. Squire at 871. Finally, in *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court held that Congress could condition the receipt of federal funds as long as the condition reasonably relates to a particular federal program. Squire at 871. But, in her dissent, Justice O'Connor argues it is enough under the Court's standard only to establish some relationship, reasonable or not. *Id.* Justice O'Connor observed further:

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

Dole, 483 U.S. at 217 (citations omitted)

Squire contends two additional factors allow Congress to use the spending power to intrude into state and local interests. First, under the Sixteenth Amendment, Congress can tax income at will, thereby guaranteeing itself an almost unlimited supply of money to spend for its own purposes. Squire at 871. Second, due to restrictive standing rules, taxpayers have little, if any, ability to challenge federal spending in the courts. *Id.* This argument that Congress can tax and spend essentially at will is no doubt premised on the recognition that there is a practical limit to the taxes that government can exact from its citizenry. It is axiomatic that every dollar that goes into the federal coffer is one less dollar available for the state coffers. Moreover, the people have a right to expect a return on their federal taxes and shouldn't have to pay twice for the same service--once to the federal government and once to the state.

"Thus, the Court effectively permits Congress to use spending power means to achieve any desired ends." *Id.* at 911-12. A similar observation prompted Madison to remark, "it must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution, limited powers." Powell at 663 n.58. In Madison's view, therefore, the ability to legislate either by unlimited powers or by unlimited means (such as by placing regulatory conditions on

the receipt of federal funds) would grant Congress the ability to legislate generally. And, indeed it does.

III

CONDITIONS ON FEDERAL FUNDS ARE OFTEN COERCIVE

The notion that the states are free to refuse federal funds and avoid an onerous condition is a fiction. As Justice Luttig observed, "the several States have become increasingly dependent upon the Federal Government for funds, because the Federal Government has increasingly become dependent upon the revenues from taxation it receives from the citizens of the several States." *Virginia Department of Education v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (dissenting opinion).

Indeed, each year federal funds are becoming a larger portion of each state's revenue. These funds run to billions of dollars and none of this federal money is given without conditions. *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911 (1995). Almost 15 years ago in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court observed that in the past 25 years federal grants had increased by more than ten fold and accounted for about 20% of state and local government expenditures. *Id.* at 552-53. Whether for practical or political reasons, the evidence shows empirically that the states are dependent on federal funds. Congress recognizes this fact. It knows as a practical matter that the states have little choice but to accept numerous and heavy-handed conditions on federal funds.

Donald Mizerk reports that at least 59 conditions attach to every federal grant to the states:

> These policy objectives include antidiscrimination requirements regarding race, religion, handicaps, and gender; sixteen rules protecting the United States'

> cultural and physical environment; rules concerning the use of American ships, planes, and companies in the implementation of grant activities; employment rules; accounting and management rules; freedom of information rules; and 'right of privacy' rules. . . . A state, by accepting one grant, opens the flood gates for federal restrictions on the state's general activities.

Donald J. Mizerk, *The Coercion Test and Conditional Federal Grants to the States*, 40 Vand. L. Rev. 1159, 1171 (1987).

According to Mizerk, although some states may willingly accept such wholesale limitations on their sovereignty, many states do so only reluctantly in their need. For example, some state laws require the state to revert to the favored state policy when a condition is invalidated. *Id.* at 1172. Similarly, the State of Nevada enacted a law that raised the state's maximum speed limit to 70 miles per hour. However, the state was required to reduce the limit to 55 miles per hour when the Department of Transportation threatened to recall the state's highway grant if it didn't comply with the federal policy. *Id.*

Congress' use of conditions on federal funds has even altered the structure of state governments. *Id.* at 1173. Mizerk notes, for example, some conditions require the establishment of state agencies to implement the federal program. *Id.* At one time, North Carolina was required to amend its constitution to allow for the establishment of a new health department. *Id.*

Mizerk maintains that spending conditions can also disrupt separation of powers within a state by circumventing the state's appropriation process and depriving the Legislature the ability to control state revenues. *Id.* Some federal programs even dictate the very people who will administer the program. *Id.* Although these factors suggest good reasons for the states in the first instance to reject conditional federal grants, the maintenance of ongoing programs becomes increasingly more

dependent on federal funds--funds the states may not lightly pass over.

> The pressure on states to cooperate with grant conditions is even more apparent when Congress attaches conditions to existing federal benefits. Having accepted the federal benefit with the original set of limited conditions, a state often comes to rely on the presence of the benefit. The state may have structured its services and budget to accommodate the program and the original conditions or may have planned future projects and expansion around federal incentives. Because of the state's reliance on the program, rejecting the federal grant would place the state in a worse position than before Congress imposed the new condition.

Mizerk at 1174.

Additionally, the coercive nature of conditional federal funds is heightened when the conditions are unrelated to the purpose of the funds. Of the 59 conditions noted above, Mizerk remarks: "These conditions generally have little to do with any spending program, but rather 'are part of the fabric of an overriding national policy.'" *Id.* Such conditions become particularly odious when the sanctions for noncompliance are grossly out of proportion to the violation.

In *Virginia Department of Education v. Riley*, 106 F.3d 559, for instance, the federal government gave the states money to educate disabled students on the condition the states "assure all children with disabilities the right to a free appropriate public education." *Riley*, 106 F.3d at 560. Thus, the federal government withheld the state's *entire* $60 million dollar grant when Virginia expelled 126 students "for reasons wholly unrelated to their disabilities." *Id.* The Fourth Circuit held that withholding the entire grant, rather than a pro rata share that would be available for the expelled students--$58,000, was not

"encouragement", as the federal government claimed, but rather "begins to resemble impermissible coercion." *Id.* at 569.

As a practical matter, rarely is the acceptance of conditions on federal funds "voluntary" in a meaningful sense. The result is an overreaching federal government and a weakened state sovereign. Therefore, to protect state powers and the federalist design, this Court should grant review and set some overdue limits on Congress' spending powers.

IV

THIS COURT HAS NOT PROVIDED ANY CONSISTENT AND PRACTICAL STANDARDS FOR DETERMINING THE SCOPE OF CONGRESS' POWER UNDER THE SPENDING CLAUSE

In 1987, this Court decided the case of *South Dakota v. Dole*, 483 U.S. 203. That case posed the question whether the receipt of federal highway funds could be conditioned on the state's adoption of a minimum drinking age. This Court upheld the condition concluding that Congress could use conditional offers of federal funds to "regulate" the states indirectly in ways it could not do directly, thus affirming that Congress' power under the Spending Clause is not limited to its other powers enumerated in the Constitution.

Since the decision in *Dole*, many legal scholars have criticized this Court for allowing Congress seemingly limitless power to "negotiate" with the states over federal funds. Professor Lynn Baker notes that three general concerns have been repeatedly raised. Baker at 1932. First, legal scholars have observed that limits on Congress' ability to regulate can be circumvented through the taxing and spending powers. *Id.* at 1933. In fact, after *Dole*, no scholar seriously contends that the federal government is one of limited powers. *Id.*

Second, legal scholars are skeptical of the "constraints" on the spending power this Court identified in *Dole*. *Id.* Although

this Court suggested in *Dole* that Congress could not use the spending power to unduly coerce the states or to impose conditions "unrelated 'to the federal interest in particular national projects or programs,'" most scholars agree that decision did not provide a workable definition of these standards. *Id.*

And third, to the extent *Dole* defers to the political process to act as a check on conditions of federal spending, legal scholars question the ability of the states to protect themselves from Congress within that process. *Id.* Professor Albert Rosenthal argues that because "[a] continued high level of federal financial assistance will often be of great importance to state and local governments . . . these governments may not find it politically expedient to dilute their efforts to obtain such funds by simultaneously campaigning against the conditions, however objectionable they may appear to be." Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103, 1141 (1987). And, as Baker reports, Professors Thomas McCoy and Barry Friedman posit that because a state may reject the conditioned federal funds, voters will attribute the result of the conditions to state officials rather than to their federal counterparts. Baker at 1934. Thus, they argue, the voters are unlikely to discern any abuse of congressional power. *Id.* They conclude, therefore, that federal officials will not be held accountable. *Id.*

Of equal concern is this Court's vacillating Spending Clause doctrine. A comparison of this Court's ruling in *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984), with the ruling in *Dole* illustrates the uncertainty that pervades the Court's spending power jurisprudence. In *League of Women Voters*, this Court invalidated a 1981 amendment to the Public Broadcasting Act of 1967 that established a nonprofit corporation to distribute federal funds to noncommercial television and radio stations. The amendment conditioned the funds by requiring that the

stations not engage in "editorializing." This Court analyzed the case as it would a direct regulation rather than as a condition on federal funds and struck down the amendment as an abridgment of the freedom of the press. Mizerk at 1182.

In his dissent, however, then Associate Justice Rehnquist did analyze the case as a spending power issue. *Id.* He concluded that the stations knew of the condition when they accepted the federal money and, therefore, the condition was valid. *Id.* According to Mizerk, while both the dissent and majority addressed first amendment concerns, traditional spending power analysis would have ignored first amendment implications. *Id.* at 1182-83. As far back as *Steward Machine Co. v. Davis*, 301 U.S. 548, this Court held that virtually any condition attached to federal funds is permitted because the state can decline the grant and protect its sovereignty.

Thus, in *League of Women Voters*, Justice Rehnquist argued that Congress had a legitimate purpose in conditioning grants to noncommercial broadcasting stations. Mizerk at 1183. Likewise, in *Dole*, Chief Justice Rehnquist stated that Congress had a legitimate purpose in conditioning federal highway monies on drinking age limitations. Mizerk at 1183. So long as the states could reject the federal grants, and avoid the conditions, the content of the conditions was all but irrelevant. *Id.* As Mizerk points out, however, what proved to be a consistent approach for Justice Rehnquist, was a complete about face for this Court; Justices Marshall, Powell, and Blackmun applied the same reasoning in *Dole* that they had previously rejected in *League of Women Voters*. *Id.* at 1183-84.

> The impression that emerges from the Justices' ambivalence is that the Court will either agree or disagree with the contested condition depending on the individual Justices' subjective inclinations. With that, the analysis has plunged into a Lochnerian abyss with the coercion test being selectively reintroduced

> when the Court wishes to uphold the condition or forgotten when the Court wishes to strike it down.

Id. at 1184.

This Court is of an uneven temperament when it comes to spending power analysis. Without clear guidance from this Court, it is impossible for Congress, the states, or the lower courts to know how to resolve disputes over the conditioning of federal funds. To clarify the applicable legal standards, this Court should grant review.

V

THE WRIT OF CERTIORARI SHOULD BE GRANTED TO PREVENT AN "END RUN" AROUND THIS COURT'S RECENT DECISIONS UPHOLDING FEDERALIST PRINCIPLES

Recent Supreme Court decisions show a decided interest by this Court in reestablishing the federal-state balance of power the Framers envisioned. However, this Court's failure to address limits on federal spending threatens to undo those decisions as well as the federalist structure.

New York v. United States, 505 U.S. 144 (1992), is a pivotal case in restoring limits on federal power. *See* Squire at 883. In that case, this Court invalidated a provision of the Low-level Radioactive Waste Policy Amendments of 1985 that required the states to provide for the disposal of certain wastes generated within their borders. To "encourage" compliance with this law, Congress gave the states money for meeting established timetables and authorized compliant states to charge out of compliance states quadruple the normal surcharge for receiving wastes. These provisions of the Act were upheld because Congress may condition the receipt of federal funds and Congress may give states the choice to regulate according to federal dictates or to be preempted by federal law. *New York*, 505 U.S. at 178.

However, this Court declared the "take-title provision" invalid. That provision imposed state liability for all damages resulting from failure to take possession of the waste generated within the state's borders. That provision left the states in an untenable position. They could either take possession of the waste generated within their borders or regulate the waste as directed by the federal government. In either event, the state was commandeered to do the bidding of the federal government. This Court struck down the "take-title provision" as beyond the scope of congressional power remarking that it crossed the "line distinguishing encouragement from coercion." *Id.* at 174-76.

In *Printz v. United States*, 521 U.S. 898 (1997), this Court again faced attempts by Congress to co-opt the states and expanded on its holding in *New York*. *See* Squire at 889. *Printz* involved a challenge to the Brady Handgun Violence Prevention Act. The Act required firearms dealers to obtain personal information on firearms purchasers and provide this information to the local chief law enforcement officer. This officer was required to do a background check on each prospective purchaser before the sale was completed. But this Court invalidated this requirement holding that Congress could not conscript state law enforcement officers to participate in the administration of a federally enacted regulatory scheme. *Printz*, 521 U.S. at 935. Writing for the majority,

> Justice Scalia first announced the oft-cited and "incontestable" principle that "the Constitution established a system of 'dual sovereignty.'" The majority reiterated that "although the States surrendered many of their powers to the new Federal Government," the text of the Constitution reflects the fundamental understanding that the states nevertheless "retained 'a residuary and inviolable sovereignty.'" Perhaps most importantly, "[r]esidual state sovereignty was . . . implicit, of course, in the

> Constitution's conferral upon Congress of not all government powers, but only discrete, enumerated ones . . . which implication was rendered express by the Tenth Amendment." Moreover, "the Framers rejected the concept of a central government that would act upon and through the States."

Squire at 892-93.

These cases demonstrate this Court's commitment to the Constitution's federalist design. However, this Court has left a gaping hole in the federalist structure by not defining the constitutional scope of conditional spending. Indeed, while this Court is shoring up the power of the states, the federal government is tearing it down. This Court's landmark decision in *United States v. Lopez* illustrates the point.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court invalidated a congressional Act promulgated under the Commerce Clause for the first time in almost 60 years. See Squire at 887. That case involved a challenge to the Gun Free School Zones Act that made it a federal crime to possess a gun near a school. Relying on established principles of federalism, Chief Justice Rehnquist held the Constitution required the federal government to regulate only within its enumerated powers. This Court found the possession of a handgun near a school had nothing to do with "commerce" or "any sort of economic enterprise" and the Act exceeded the limits of federal power. *Lopez*, 514 U.S. at 561. In his concurring opinion, Justice Kennedy observed that to hold such activity commercial would blur the boundaries of power between the state and federal governments. *Id.* at 577.

But no sooner had this Court spoken than federal regulators found a way to override the decision with a condition on federal funds. Professor Baker reports that three days after this Court's ruling in *Lopez*, President Clinton declared that he was "determined to keep guns out of our schools," suggesting

that Congress would not violate the Constitution if it now chose to "encourage" states to ban guns from school zones "by linking Federal funds to enactment of school-zone gun bans." Baker at 1913.

> President Clinton's understanding of current Spending Clause doctrine is plainly correct. In 1987, the Court held in *South Dakota v. Dole* that the Spending Clause authorizes Congress to make even those conditional offers of funds to the states which, if accepted, regulate the states in ways that it could not directly mandate. Thus, with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states.

Id. at 1914.

Professor Baker's analysis is telling. With the Court's revitalization of states' rights, it is ironic that this Court has not addressed the greatest threat to federalism--the scope of the spending power. This Court should address the issue now.

CONCLUSION

If the federalist structure of our government is to mean anything, this Court must set some workable limits on Congress' power to co-opt the states through the spending power. Therefore, this Court should grant the writ of certiorari.

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Respectfully submitted,

M. REED HOPPER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Attorney for Amicus Curiae Pacific Legal Foundation